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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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13pp

TABLE OF AUTHORITIES

Page

Cases:

Crumpton v. *United States*, 138 U.S. 361 7

Donnelly v. *DeChristoforo*, 416 U.S. 637 7

Glasser v. *United States*, 315 U.S. 60 1

Lawn v. *United States*, 355 U.S. 339 ..... 4, 5, 6, 7

Mason v. *United States*, 719 F.2d 1485 8

United States v. *Carter*, 720 F.2d 941 7

United States v. *DiPasquale*, No. 83-1364 (3d Cir. July 31, 1984) 10

United States v. *Hasting*, No. 81-1463 (May 23, 1983) 9

United States v. *LaCoste*, 721 F.2d 984, cert. denied, No. 83-6391 (June 4, 1984) 7

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 ..... 5, 7

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1. Respondent's brief is largely occupied with rearguing the defense case. Respondent states (Br. 1) that the record in the case "shows that Young's actions were done in good faith and without the requisite *mens rea* to support a criminal conviction." It is sufficient to observe that respondent made the same argument without success to the jury, and that on appeal, the evidence must be viewed in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Respondent's attempt to retry the facts of the case is, therefore, beside the point.

In any event, respondent's portrayal of the evidence in the case is somewhat misleading. Respondent acknowledges (Br. 1, 16), as he must, that he contracted on behalf of Compton Petroleum Corporation to supply virgin crude oil to Apco Oil Corporation, and that he deliberately supplied a mixture of fuel oil and high gravity condensate instead. Respondent asserts, however, that to do so was "a favor for

all parties involved" (*id.* at 6), that he "knew it was legally possible to do this" (*id.* at 3), and indeed that this operation produced "a better stream of oil than Apco was generally getting" (*id.* at 5).

Respondent neglects to point out that the Apco officials involved testified without exception that respondent's deliveries of fuel oil in lieu of crude oil did *not* meet their contract specifications. For example, Hugh Bradley, Apco's vice president of supply and transportation and the person with whom respondent contracted, testified as follows (Tr. 358-359):

> Q. Did Mr. Young ever tell you that he was selling you thousands of barrels of fuel oil mixed with crude and condensate every month?
>
> A. No.
>
> Q. To fulfill the contract he had with your company?
>
> A. No.
>
> Q. Would you consider that to be a fulfillment of a contract that you had with Compton and Apco if that were true?
>
> A. You mean selling us residual fuel?
>
> Q. Yes, sir.
>
> A. No, I would not.

See also Tr. 352-353, 393-395. Even respondent's crude oil trader, Phillip Mark Alexander, testified (Tr. 59) that he had never "heard of a company legally blending fuel oil with crude oil, condensate and saying that the whole thing is crude oil." Not a single witness supported respondent's

claim that fuel oil mixed with condensate could be certified and sold as crude oil.[1]

Perhaps most telling of all was respondent's own conduct at the time of the events in question. On three separate occasions, when questioned by two Apco officials (former friends) and by FBI agents, respondent falsely denied that he was supplying fuel oil in lieu of crude oil (Tr. 293-294, 357-358, 379, 496, 516).[2] If he had thought he was doing Apco a "favor" and was in compliance with the law, he would have had no reason to lie. Under the actual circumstances, however, it is understandable that respondent found the truth "kind of hard to explain" to his friends at Apco (Tr. 496).

On the strength of this overwhelming and virtually uncontradicted evidence of respondent's willful violation, it would have been surprising indeed had the jury failed to return a guilty verdict.

2. As to the legal issues presented by this case — the court of appeals' rejection of the "invited response" doctrine, respondent's failure to object at trial to the prosecutor's supposed errors in rebuttal argument, and the court of appeals' failure to consider the harmlessness of the error —respondent has but little response.

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[1]The only evidence in the case remotely supporting respondent's claim that he honestly believed that his actions were in compliance with the law and his contracts was respondent's own testimony at trial (Tr. 477) that, based on "my experience what I had heard and stuff through counsel and stuff," it was legitimate to sell *crude oil* as *fuel oil* — exactly the opposite of respondent's scheme and one that would not result in a false claim for entitlements.

[2]Indeed, in contradiction to his current position, respondent told the FBI agents at the time that crude oil was a "more valuable" product than fuel oil, and that if he discovered that he was selling fuel oil to Apco instead of crude oil he "would have immediately terminated the transaction or the deal" (Tr. 294).

a. The court of appeals held that the prosecution is not entitled to respond to improper defense remarks in summation, stating that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response" (Pet. App. 11a). Respondent does not appear to argue that this "rule" is correct. See Resp. Br. 27 ("There are various cases where a prosecutor has been permitted to respond to inflammatory and egregious conduct of defense counsel."). Nor does respondent make any attempt to dispute or distinguish the numerous cases cited in our opening brief (at 17 n.14, 20-21) in which the courts of appeals have recognized and applied the principle of "invited response." [3]

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[3]Respondent does assert (Br. 26-27) that this Court's decision in *Lawn* v. *United States*, 355 U.S. 339 (1958), is "not on point." As noted in our opening brief (at 16, 19-20), the situation in *Lawn*, where the prosecutor in rebuttal expressed his personal opinion on the credibility of certain key witnesses, was quite similar to that here. Respondent's purported distinction of *Lawn* is achieved by quoting only one of the three reasons this Court provided for affirming the conviction notwithstanding the prosecutor's remarks.

The first reason, quoted at Resp. Br. 27, was that the prosecutor in *Lawn* "did not say nor insinuate that the statement was based on personal knowledge" (355 U.S. at 359-360 n.15). The same, of course, could be said here. As pointed out in our opening brief (at 25), the prosecutor's remarks below contained no suggestion whatsoever that they were based on evidence outside the record, and indeed specifically directed the jurors' attention to the testimony.

The second reason for affirmance in *Lawn* — the reason most pertinent to this case — was that Lawn's counsel "had argued that the Government's case was a persecution of [the defendants], had been instituted in bad faith," and was not believed even by the prosecutors (355 U.S. at 359-360 n.15). Respondent's counsel's summation in the instant case was virtually the same, beginning with attacks on "unfair[]" government tactics and attempts to "poison your [the jury's] minds unfairly" (J.A. 4) and proceeding to the statement that not even the prosecutors believed that respondent was guilty (J.A. 5). This Court's holding in *Lawn* that the defense counsel's "comments clearly invited

Moreover, respondent essentially concedes (Br. 26) that the prosecutor was "entitled" to make the statement (J.A. 8-9; Tr. 549) of his personal belief that respondent "intended to defraud Apco." [4] This was, of course, the principal instance of vouching in the argument.

Respondent's position, therefore, reduces to the complaint that the prosecutor's argument "did not stop there" but contained additional statements of belief in respondent's guilt (Resp. Br. 26). However, having introduced — in a most emphatic fashion —the extraneous question of the prosecutor's beliefs, respondent could hardly complain when the prosecutor corrected the mistaken attack on his integrity more than once.

In any event, far from "repeat[ing] his personal belief in respondent's guilt on each subsequent page of his rebuttal argument," as respondent claims (Br. 26), the prosecutor did so only one additional time, two paragraphs later, after

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the reply which petitioner Lawn now attacks" (355 U.S. at 359-360 n.15) is directly and unmistakeably on point.

The third reason for affirmance in *Lawn* — the curative effect of trial court instructions — is not applicable here, because respondent's failure to object at trial or to request curative instructions deprived the trial court of any opportunity to consider issuing such instructions.

While purportedly distinguishing *Lawn*, respondent makes no attempt to distinguish *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940), in which this Court also recognized the "invited response" principle.

[4]While conceding that this remark by the prosecutor was invited by the defense, respondent claims (Br. 21) that the statement (J.A. 8-9; Tr. 549) that "I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of" went outside the record and was not supported by the evidence. However, respondent's own testimony at trial confirmed that Compton received 85 cents a barrel for its deliveries to Apco (Tr. 501-502) and that respondent personally received a bonus of one percent of Compton's net profits (Tr. 503).

describing the testimony of two friends of respondent whom respondent had deceived. The prosecutor then stated: "I don't know what you call that, I call it fraud. You can look at the evidence and you can remember the testimony, you remember what they said and what he admitted they said. I think it's a fraud" (J.A. 9).[5] Perhaps this reiteration of his belief in his case was not strictly necessary to dispel the misimpressions sought to be planted by respondent's counsel, but in the heat of trial, where *some* response was called for (as even respondent esssentially concedes), this additional statement hardly seems egregious or prejudicial. Indeed, it was little more than a statement of the obvious.

The other comments objected to by respondent were not statements of personal belief in respondent's guilt. The first (J.A. 10) was a correction of defense counsel's statement (J.A. 6) that Apco would not be required to refund the entitlements payments improperly received as a result of respondent's scheme. The prosecutor's statement that "in his experience" the government would "come back" for a refund (J.A. 10) was fully supported by the record evidence. Indeed, Apco's official in charge of regulatory compliance had so testified (Tr. 440). And the prosecutor's admonition that the jury would not be "doing your job as jurors in finding facts as opposed to the law" if the jury acquitted on the basis of respondent's concept of "honor and integrity" instead of following the court's instructions (J.A. 10-11) was an unexceptional (even if not well worded) statement against jury nullification.

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[5]It bears emphasis that these statements contained the prosecutor's personal opinion *on the evidence*; like the statements in *Lawn*, they contained no suggestion or insinuation that they were based on personal knowledge outside the evidence at trial. See 355 U.S. at 359-360 n.15.

In short, respondent does not attempt to defend the court of appeals' erroneous per se holding that the prosecutor is not entitled to reply to improper defense arguments in summation. Rather, he attempts lamely to exaggerate the extent of the prosecutor's response while minimizing the impropriety of his own provocative remarks. A fair reading of the defense argument and government reply clearly reveals that, while both counsel might have been more circumspect, the prosecutor's rebuttal was well within the bounds of fair response.

b. Respondent contends (Br. 18-19) that a defendant has no obligation to object to improper prosecutorial argument at trial, because "an objection at that point is counterproductive." He cites no precedent for this view, and it has been roundly rejected by this Court. This Court has held that curative instructions can be adequate to correct errors stemming from improper arguments by the prosecution (*Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974); see also *Lawn*, 355 U.S. at 359-360 n.15), and that defense counsel are under a duty to lodge timely objections to improper argument at trial (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940); *Crumpton* v. *United States*, 138 U.S. 361 (1891)).[6]

The court of appeals disregarded respondent's failure to lodge a timely objection, concluding that the prosecutor's remark constituted "plain error" simply on the basis of the nature of the error in light of precedents in that Circuit. The

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[6]Even assuming arguendo that respondent is correct that to interrupt the prosecutor's argument by an objection is counterproductive because it calls attention to the error, there is no excuse for a defendant's failure to ask for a bench conference, request curative instructions, or move for a mistrial. These courses of action take place out of the hearing of the jury. See *United States* v. *Carter*, 720 F.2d 941, 950 n.7 (7th Cir. 1983); *United States* v. *LaCoste*, 721 F.2d 984, 988 (5th Cir. 1983), cert. denied, No. 83-6391 (June 4, 1984).

court accorded no consideration whatsoever to whether respondent's "substantial rights" had been prejudiced under the circumstances of this case. This was error, as we demonstrated in our opening brief (at 32-33).[7] Respondent does not attempt to defend this misconstruction of the "plain error" rule.

Instead, respondent defends the judgment below on the alternative ground that the prosecutor's remark in fact prejudiced his right to a fair trial. His argument on this point, however, is little more than the assertion (Resp. Br. 18) that "[t]he jury did not return a verdict of guilty against Billy Young based on the evidence. The jury returned a verdict of guilty because of the prosecutor's repeated statements of his personal belief in Young's guilt and because of the prosecutor's insistence that they find Young guilty." Without further analysis, however, this amounts to no more than a claim that prejudice may be *assumed*.[8]

Perhaps recognizing that the prosecutor's remarks on the face of the record (and especially in the context of the defense provocation) appear to carry little danger either of implying the existence of evidence outside the record or of overawing the jury by the prestige of the government (see U.S. Br. 24-26), respondent relies heavily on the "non-

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[7]Interestingly, since the petition for a writ of certiorari was filed in this case, the Tenth Circuit appears to have retreated from its position that improper prosecutorial remarks in summation constitute "plain error" merely because the court has so frequently condemned them. See *Mason* v. *United States*, 719 F.2d 1485, 1489-1490 (10th Cir. 1983).

[8]Respondent's picture of "intimidated jurors [who] did as they were told by the prosecutor" (Resp. Br. 15) is a bit overdrawn. After all, the jury *acquitted* respondent of interstate transportation of stolen property, the most serious crime with which he was charged. This suggests that the jury reached its own conclusions on the evidence, independently of the prosecutor.

verbal" aspects of the prosecution's summation. Respondent states (Br. 22) that "[i]t is impossible to reconstruct here the prosecutor's loud, arm-waving, finger-stabbing closing rebuttal argument. The non-verbal communication was destructive of respondent's defense along with the verbal communication." This argument merely substantiates our point (U.S. Br. 30) that trial court and counsel are in a far superior position to evaluate alleged errors in prosecutorial argument, which often depend on precisely the factors of tone, gestures, emphasis, and the like alluded to by respondent. The significance of such "non-verbal communication" is one important reason for insisting that alleged errors of this sort be raised at trial, not for the first time on appeal.

We do not know, and the record does not (and cannot) reveal, whether respondent's description of the closing argument is accurate. We do know, however, that neither trial court nor trial counsel saw anything amiss in the prosecutor's argument at the time it was made. If there had been any loud, finger-stabbing argument, then it presumably would have been perceived by those present in the courtroom. Neither the court of appeals nor this Court is in any position to contradict the eloquent silence of trial court and counsel.

c. Respondent's discussion of harmless error requires little reply. Contrary to respondent (Br. 23), the principle of *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 9, that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless," applies in all cases, not just those involving an exercise of the court's supervisory powers, and to all errors, not just comments on the accused's failure to testify.

The court of appeals simply failed to make any assessment of the impact of the prosecutor's statements, either in the course of making its "plain error" determination or

pursuant to a harmless error analysis. Accordingly, an error that was marginal at worst, and not noticed at trial, resulted in a needless reversal of the conviction. Reversal of a conviction is too high a price to pay for a prosecutor's error (if it was an error) that was not noticed at trial, when the error is not shown to have affected the defendant's substantial rights.[9]

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

SEPTEMBER 1984

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[9] *United States* v. *DiPasquale*, No. 83-1364 (3d Cir. July 31, 1984), slip op. 27-32, is an example of the analyusis that should be applied to a case of this kind.

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